IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 483 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

HAJIBHAI HAJI REHMAN AND ANOTHER

Versus

VARSHA DALSUKHLAL MEHTA AND ANOTHER

==========

Appearance :
MR PV HATHI for the applicants.
MR SURESH M SHAH for the opponents.

==========

CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 01/03/2006

ORAL JUDGMENT

By filing this Revision Application under section 29 (2) of the

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 [hereinafter referred to as the Act], the petitioners, who are original defendants of Regular Civil Suit No. 992 of 1983 have challenged the judgment and order passed by the appellate Court dismissing the appeal of the petitioners being Regular Civil Appeal No. 24 of 1991.

The respondent No.1 is the owner and landlord of the suit premises, which was let out to defendant No. 1 for the purpose of his business. The premises was let out to the defendant who are partners of Saurashtra Ice & Cold Storage. The said premises is situated in Jamnagar City in Hawai Chowk area. The premises was let out at a monthly rent of Rs.18/-. The aforesaid suit was filed on the ground that the defendant is in arrears of rent for more than six months i.e. from 1.3.1978 to 23.10.1983. It is alleged that the suit premises is kept closed for more than 10 months preceding filing of the suit. It is also alleged that the suit premises is sublet to defendant No.3. On the aforesaid three grounds, the suit for eviction was filed.

The said suit was resisted by the defendant on various grounds to deny the claim of the plaintiff.

The trial Court, by judgment and decree dated 18.8.1990 decreed the suit on the ground of non-user of the premises as well as on the ground of subletting. The trial Court negatived the claim of the plaintiff for getting possession on the ground of arrears of rent.

Being aggrieved by the said decree passed by the trial Court the petitioners herein preferred an appeal being Civil Appeal No. 24 of 1991

before the District Court at Jamnagar. The aforesaid appeal was heard by Joint District Judge, Jamangar, who, by his judgment and order dated 19.12.1991, has dismissed the same, against which the unsuccessful defendants have preferred this Revision Application before this Court invoking section 29 (2) of the Act. During the pendency of this Revision, the original plaintiff-landlord died and, therefore, his heirs are also brought on record.

I have heard Mr. P.V. Hathi for petitioner and Mr. S.M. Shah for the respondent. I have also gone through the record and proceedings and the judgment of the courts below.

Mr. P.V. Hathi, learned advocate for the applicants-original defendants submitted that even as on today, the defendants are doing business in the disputed premises and the premises is being used by the defendants. He further submitted that during the pendency of the Revision Application, the defendants have also filed a Civil Application, being CA No. 212 of 2005, for taking subsequent events on record. Mr. Hathi therefore submitted that since the premises is under actual use of the defendants, the judgment and decree passed by both the courts below requires to be set aside and the possession of the defendants should not be disturbed.

Learned advocate Mr. S.M. Shah for the opponent - original plaintiff submitted that it is not relevant whether today the defendants are using the premises as the situation prevailing at the time of filing of the suit is required to be considered. He submitted that even if the defendants started using the premises at present, the same is no ground

for reversing the decree passed by the trial Court and confirmed by the appellate Court. He submitted that as per the provisions contained in section 13 (1)(k) of the Act, the Court is required to see whether the premises have not been used without reasonable cause for a continuous period of six months preceding the date of the suit, and if that is proved, it is not relevant whether subsequently the defendants, in order to nullify the decree, started using the premises.

The trial Court decreed the suit on the ground of non-user and sub-letting. However, the appellate Court found that sub-letting is not proved from evidence on record. However, the judgment of the trial Court was confirmed on the ground of non-user. This Court, therefore, is required to consider whether the decree passed by the trial Court on the ground of non-user, which is confirmed by the appellate court, is sustainable or not.

In this behalf, it is required to be noted that the suit premises was let out to the defendants for the purpose of business which is in the name of Saurashtra Ice & Cold Storage. The appellate Court has considered the oral evidence of the landlord in connection with non-user of the suit premises. So far as non-user of the premises is concerned,the provisions of section 13(1)(k) of the Act, which reads as under:

> “13. When landlord may recover possession:
> (1). Notwithstanding anything contained in this Act but subject to the provisions of section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-
> xxx xxx xxx xxx xxx

> (k). that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit. .. ”

Learned appellate Judge has dealt with the aspect of non-user in paragraph 12 of his judgment. The appellate Judge found that the say of the plaintiff that the premises is not used for a long period is corroborated by the evidence of one Balkrishna Harilal Joshi, Exh. 78, who is serving as Assistant Engineer, Gujarat Electricity Board, Jamnagar. As per the evidence of the said witness, the meter readers of Gujarat Electricity Board are regularly going to the place for recording meter reading and on that basis bills are prepared by the Bord. As per the evidence of the said witness, Saurashtra Ice & Cold Storage is the consumer of electricity board and the said consumer is having two meters. One meter is for domestic purpose and the other is for commercial purpose. The appellate Court has considered the evidence of the said witness for coming to a conclusion that the premises is shown as locked at the time of taking inspection for recording reading of the meter. The said fact is also mentioned in the ledger maintained by the Board, which is produced on record at Exh. 80, 81 and 82. The learned appellate Judge has considered the evidence of this witness in detail. The learned Judge, at the time of appreciation of evidence on record has observed as under: [paragraph 12, typed page 13 through typed page 19] (reproduced verbatim):-

> “He has stated that the bills produced before the court vide exh.68 to ex.75 are pertaining to the bills of Saurashtra Ice

Cold Storage. He has further stated that in each every bill it is mentioned as locked. It means the premises in which the meter of G.E. Board is installed is locked at the time of making inspection by the meter reader of the G.E. Board. He has further stated that as per the endorsement of the bills the same has been mentioned in the ledger account. He has produced the ledger account vide ex. 80, ex.81 and ex.82 As per the said ledger account the defendant no.1 Saurashtra Ice and Cold Storage, Jamnagar is being mentioned as consumer and its address is mentioned in the area of Hawai chok, Jamangar. As per ledger account vide ex. 81 the bill was given on 5-5-83 against the name of consumer and his address it is mentioned 'L' means the premises is locked. It is further mentioned in the bill dtd 5.8.83 that the premises is locked. The bill for the period of April 1983 has been produced vide ex.68. The said bill is given in the name of Saurashtra Ice and Cold Storage, Jamnagar, Hawai Chowk, Jamangar. It is mentioned in the said bill of April 1983 that the premises is locked. The bill of July 1983 has been produced by the said witness vide. ex.70. In the said bill also it is mentioned as locked it mans in the month of July 1983 or before the rented premises was locked and that is why the meter reader of the G.E. Board could not recorded the meter reading of the meter of the rented premises. The bill of November 1983 is produced vide exh.72. The said bill is also pertaining to the firm of the defendant no.1 and it is mentioned at the residential address of Hawai chowk. It is also mentioned in the said bill as locked. The bill of March,

May and July 1983 have been produced vide exh.73, exh.72 and ex.74. In all these three bills it is mentioned as locked it means the rented premises is locked for the period from March 1983 to November 1983 and that is why the meter reader of G.E. Board has mentioned in the said concerned bills as locked. The defendant no.1 has not been explained as to why the meter reader has mentioned as locked in the bills of the rented premises. It is an admitted position that the said bills as stated above are given for the consumption of the electric power of the rented premises. Therefore, in view of this factual aspect, it can be definitely held that the said bills vide exh.68 to exh.75 are pertaining to the rented premises and as per the said bills the rented premises is remained as locked since from March 1983 to November 1983. The defendant has not been able to produce any evidence to show that during the said period the electric consumption is being used by its firm. The defendant no.1 has produced two bills vie exh.85 and ex.86 for the period of 1980-81. The said bills are not pertaining to the period alleged by the plaintiff. It is not the say of the plaintiff that during the period mentioned in bills vide ex.85 and ex.86 the rented premises was closed. Therefore, the said bills ex.85 and ex.86 have no concerned with the present dispute. According to my mind the burden lies upon the defendant no.1 to prove that the rented premises is remained opened since from January 1983 to October 1983 because it is specific allegation of the plaintiff that the rented premises is not being used by the defendant continuously for 10 months by the defendant no.1 till the

filing of the suit. Therefore, it is bounden duty of the defendant no.1 to show by cogent and reliable evidence that the rented premises is not being closed for 10 months continually as alleged by the plaintiff. I may state that the defendant no.1 has not discharged his duty satisfactorily and has not been able to produce any piece of evidence to show that the allegation made by the plaintiff are false and got up therefore, when the plaintiff has been able to produce cogent and reliable evidence to show that the rented premises is being closed from January 1983 to November 1983 by the bills vide exh.68 to ex.75 then there is no reason to disbelieve the plaintiff that the rented premises is under nonuser by the defendant no. since more than 10 months. I may state that the defendant no.1 has in all three premises, one factory is in the Bedeswar, while one shop is in the area of Tinbati. The defendant has produced the bills vide ex. 83 and 84 but the said bills are pertaining to the shop of Tinbati which has no concerned with the present dispute. The bill vide ex.84 is pertaining to the period of 1982 and as per the said bill vide ex.84 it can be seen that the electric consumption was used in the year 1982 in the rented premises but it is not the allegation of the plaintiff that the rented premises is not being used by the defendant no.1 in the year 1982. Therefore, if the defendant no.1 has produced any bills for the period of 1982 or above those bills have no concerned with the present dispute. The defendant has also produced some bills which are pertaining to the premises of Bedeswar. I may further state at the costs of the repetation that at here the dispute is

regarding the rented premises situated in the area of Hawai chowk, Jamnagar. Therefore, if the defendant no.1 has produced any bills pertaining to the premises of Tinbati or Bedeswar those evidence have no concerned with the present dispute. The defendant has also produced the licence of the Health Department vide ex.108 but it has no concerned with the present dispute because it is pertaining to the premises of Tinbati. The defendant has also produced the licence certificate vide ex.109 and ex.110 and ex.111 but all these certificates are pertaining to the shop situated in Tinbati and they are in the name of Saurashtra Ice Depot. I may state that the Saurashtra Ice Depot is not the tenant of the present plaintiff and it is not the defendants before the court. Therefore, whatever evidence adduced by the defendants pertaining to the premises of Saurashtra Ice Depot, Tinbati has no concerned with the present dispute and such evidence cannot be looked into. Therefore, whatever licence produced by the defendants that cannot be looked into in deciding the present dispute. The defendant has also produced the licence of rented premises of Hawai Chowk vide ex. 112 it can be seen from the said licence vide exh.112 that the said licence is given for colderings. But it is given in the name of Saurashtra Ice Depot, Tinbati. I may further state at the costs of repetation that the Saurashtra Ice Depot, Tinbati is not the tenant of the rented premises. It is also not the party before the court. While the licence vide ex. 112 is not given in the name of Saurashtra Ice and Cold Storage, Jamnagar. Apart from that if we consider for the same of argument that it is

pertaining to the rented premises even though it can be seen that the said licence is given for the period from 1-4-81 to 31-3-82 and the licnece fee was recovered on 31-3-82. Therefore, in view of this licence vide ex. 112 it can be seen that the licence was given on 31-3-82. According to my mind if suppose the defendant has obtained the licnece on 31.3.82 that does not mean that the defendants have continuous business in the rented premises for the period from January 1983 to October 1983. According to my mind mere licence certificate can not take the place of proof in holding that the rented premises is not remained closed for the period from January 1983 to October 1983. The defendant has also produced the licence certificate vide. Exh. 113 and ex. 114 they are for the period from 1-4-82 to 31-3-83 and 1-4-83 to 31-3-84. The licence vide exh.113 is given on 20-11-82. The licence vide exh.114 was given on 13-9-83. As per these licences it can be seen that they are given in the name of Saurashtra Ice Depot, Tinbati it means they were not given in the name of the present defendant no.1. It is the specific case of the plaintiff that the Saurashtra Ice Depot is not his tenant, his tenant is Saurashtra Ice and Cold Storage, Hawai Chowk, Jamnagar. Therefore, in view of this factual aspect, it was the bounden duty of the defendant no.1 to produce the certificate in the name of defendant no.1 i.e. Saurashtra Ice and Cold Storage, Jamnagar, why such licence have not been produced by the defendant No.1 that has not been explained by it. Therefore, whatever the licence is produced by the defendant no.1 they are not in the name of defendant no.1 and they are

given at the end of the year. According to my mind were licence certificate cannot take the place of proof in holding that the rented premises is being used by the defendant no.1. continuously for the period from January 1983 to October 1983. It can be further seen from the evidence on record that the licence produced vide ex.115 is pertaining to the premises of Bedeswar. The licence vide exh.116 is also pertaining to the factory of Bedeswar. The licence vide exh.117 is also pertaining to the factory of Bedeswar. Therefore, these licences vide exh.115, ex.116 and ex.117 have no concerned with the present disputed premises and therefore, they cannot be considered in deciding the present dispute. Therefore, considering to the whole evidence adduced by the witness Balkrishna Joshi vide ex.78 it can be definitely held that the rented premises is not being used by the defendant no.1 for the period from January 1983 to November 1983. He is Assistant Engineer in the G.E. Board. He is not animy of the defendant no.1. He is not personal friend of the plaintiff. Therefore he is an independent and reliable witness and therefore, there is no reason to disbelieve the said witness Balkrishna Joshi vide exh.78. Therefore, in view of the evidence adduced by the said witness vide exh.78 I am in the candid opinion that the plaintiff has been successfully proved that the rented premises was or is not being used by the defendant no.1 continuously for the period from January 1983 to October 1983. The defendant no.1 has also examined the independent witness Kantilal Solanki vide exh.89. He is doing the business of clothes. His shop is

> situated in the Hawai chowk just opposite to the rented premises. According to his version the rented premises is closed since from 1982 to 1984. This witness is doing the business just near the disputed premises. This witness has no enmity with the defendant no.1. No such questions are put in cross-examination of the said witness. According to this witness he used to purchase the show from the shop of the defendant no.1 and that is why he is knowing very well the defendant no.1. He has further stated that the rented premises is closed continuously since from 1982 to 1984. Therefore, this witness gives support to the version of the plaintiff. He is the independent witness. He is doing the business of clothes, just near to the rented premises. Therefore there is no reason to disbelieve the said witness. ”

The learned appellate Judge, on the basis of evidence on record has confirmed the decree passed by the trial Court on the ground of non-user of the premises. The learned appellate Judge also found that the defendant No.1 has not examined the Manager of the firm, viz. Balkrishna Mankad. The witness summons was already served on the said witness but still he did not give evidence. The appellate Judge found that even accounts books are not produced before the Court for showing that the business was going on in the said premises during the relevant period. On the basis of evidence, the aforesaid finding of fact is recorded by the courts below. In the limited jurisdiction of this Court, this Court cannot re-appreciate the evidence as if it is an appeal. It cannot be said that the learned Judge has committed any error of law which is required to be corrected by this Court in this Revision. The findings of the

appellate Court is essentially a finding of fact, which is based on appreciation of evidence both oral and documentary. Considering this aspect of the matter, the finding of fact arrived at by the trial court and confirmed by the appellate court is not required to be disturbed by this Court in exercise of its revisional jurisdiction. The finding of non-user is, required to be confirmed as on appreciation of evidence, both the courts have recorded a concurrent finding that the premises was not used for a period of ten months prior to the filing of the suit.

In the light of what is stated hereinabove, the Revision Application is rejected. However, the defendant-tenant is granted time till 31st March 2007 to vacate the suit premises on condition that the defendant-tenant shall file an undertaking before this Court within four weeks from today to the effect that he shall not induct any other person in the suit premises and will handover peaceful and vacant possession of the suit premises to the landlord on or before 31.3.2007. The defendants shall continue to pay mesne profit till the suit premises is vacated. Rule is discharged. No order as to costs.

[P. B. MAJMUDAR, J.]

mathew